Supreme Court, U.S.
FILED

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No. ____

In The

Supreme Court of the United States

October Term, 1996

B.J. JONES, Pro se,
Petitioner,
vs.

FOREST INDUSTRIES INSURANCE EXCHANGE,
Respondent.

On Petition For a Writ of Certiorari To the Supreme Court of the State of Oregon

PETITION FOR A WRIT OF CERTIORARI

B.J. JONES, Pro se
93175 Powerline Road
Eugene, OR 97408
Telephone: (541) 485-2152

Petitioner

QUESTIONS PRESENTED

1. Whether a citizen has the right to a jury trial in all civil cases as provided by the State and Federal constitutions.

2. Whether the courts have jurisdiction as the first trier of facts in motions for summary judgment; or whether the issues of fact shall be tried by a jury, as is the law.

LIST OF PARTIES

Respondent, Forest Industries Insurance Exchange is an Oregon unincorporated association that is presently in liquidation. The estate of Forest Industries Insurance Exchange is in receivership under the auspices of the State of Oregon's Insurance Commissioner, with Jack L. Sanguin, as acting Deputy Commissioner.

Respondent is represented by legal counsel John L. Langslet et al of the law firm: MARTIN, BISCHOFF, TEMPLETON, LANGSLET & HOFFMAN, 3100 First Interstate Tower, Portland, Oregon 97201-5667.

Petitioner, B.J. Jones, aka Birdsall L. Jones, was president of the Barnacle Bill's, Ltd., an Oregon corporation, at the time of his fire loss in the Barnacle Bill's Seafood and Ribs Restaurant in Eugene, Oregon. Forest Industries Insurance Exchange was his insurer. Bj Investments, a partnership between the petitioner and his wife, leased the restaurant property to Barnacle Bill's Ltd..The petitioner is representing himself and has filed this petition *pro se*.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
COURT ORDERS.....	1
JURISDICTION.....	1
STATUTORY PROVISIONS INVOLVED.....	2
STATEMENT OF THE CASE.....	2
REASONS FOR GRANTING THE PETITION.....	4
I. SUMMARY JUDG. STANDARDS UNDER FED. R. CIV. P. 56.....	5
II. CONSTITUTIONAL GUARANTEES OF TRIAL BY JURY.....	8
CONCLUSION.....	9

TABLE OF AUTHORITIES

Page

Cases

Abramson v. University of Hawaii, F.2d 202, 208 (9th Cir. 1979)..... 8

Adickes v. S. H. Kress & Co., 3998 U.S. 144, 157 (1970..... 5

Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986)..... 6

Celotex Corp v. Catrett, 477 U.S. 317, 323 (1986)..... 5

Cruger v. Hudson River R. Co., 12 N.Y. (2 Kern.) 190, 108..... 9

Duffy v. People, 6 Hill, 75,78..... 9

First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 288-89 (1968)..... 6

Greason v. Keteltas, 17 N.Y. 491, 498..... 9

International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir. 1985)..... 7

Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir 1985)..... 5

TABLE OF AUTHORITIES - Continued

Page

Loehr v. Ventura County Community College Dist., 743 F.2d 1310, 1313 (9th Cir. 1984)..... 5

Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986)..... 6

People v. Carroll, N.Y., 3 Parker, Cr. R. 312, 321..... 9

People v. Goodwin, N.Y., 5 Wend. 251,253..... 9

People v. Kennedy, N.Y., 2 Parker Cr. R. 312, 321..... 9

People v. Lane, N.Y., 6 Abb. Prac. 105, 120..... 9

Poller v. Columbia Broadcast System, 368 U.S. 464, 467 (1962)..... 5

Ruffin v. county of alos Angeles, 607 F.2d 1276, 1280 (9th Cir. 1979)..... 6

Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973)..... 6

T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n, 809 F.2d 626, 630..... 6

TABLE OF AUTHORITIES - Continued

Page

United States v. Diebold, Inc., 369 U.S. 654, 655 (1992) 8

Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987) 9

Wynehamer v. People, 13 N.Y. (3 Kern.) 378, 427, 458 9

Statutes

28 U.S.C.

§1257(1) 2

§1872 9

Other Authorities

U.S. Constitution, 7th Amendment... 2

Oregon State Constitution, Article 1, §17 2

PETITION FOR A WRIT OF CERTIORARI

Petitioner, B.J. Jones, claimant and appellant below, does hereby petition this Honorable Court for the issuance of a Writ of Certiorari to review the judgment of the Supreme Court of the State of Oregon entered in this action on December 17, 1996.

COURT ORDERS

A copy of the order denying petitioner's petition for reconsideration with the Supreme Court of the State of Oregon is set forth in Appendix A submitted with this Petition. Also set forth, as Appendix B, is a copy of the order of the Supreme Court of the State of Oregon denying petitioner his petition for review. A copy of the Court of Appeals for the State of Oregon affirming without opinion the Respondent's motion for summary judgment as set forth in Appendix C. A copy of the order denying motions to supplement the record and for expedited appeal by the Court of Appeals, as set forth in Appendix D. A copy of the order allowing receiver's motion for summary judgment against the petitioner, as set forth in Appendix E.

JURISDICTION

The petitioner's petition for reconsideration with the Supreme Court for the State of Oregon was denied on December 17, 1996.

Jurisdiction of this Court to review the judgment of the Supreme Court of the State of Oregon is invoked under 28 U.S.C. §1257 (1).

STATUTORY PROVISIONS INVOLVED

This petition presents questions pertaining to the validity of the both the state and federal constitutional guarantees of a trial by jury. The respondent in this case defeated the petitioner's right to a trial by jury by obtaining a motion for summary judgment in his favor. Under the State of Oregon's Constitution Article I, Sec. 17, "In all civil cases the right of Trial by Jury shall remain inviolate" and under the U.S. Constitution the seventh amendment guarantees the right to a jury trial "shall be preserved".

STATEMENT OF THE CASE

This case involves the petitioner's claim against the respondent, Forest Industries Insurance Exchange, which became insolvent and is in the process of being liquidated under the authority of the State of Oregon by Circuit Court Order in Marion County No. 86-C-10499 dated March 6, 1986. The respondent was the insurer for the petitioner who suffered a fire loss prior to the respondent being liquidated. All insured claims of the petitioner have been settled through the Oregon Insurance Guaranty Association (OIGA). OIGA was statutorily required to settle the petitioner's insured claims following the respondent 's liquidation. The insured claims are not an issue in this case. Petitioner's

claim is for the consequential damages that he allegedly suffered as a result of his fire loss and which were specifically excluded from release of claims against the estate of the respondent by agreement between the OIGA's legal counsel, John W. Buehler, and the petitioner. See Appendix F and G.

Nearly ten years following the petitioner's fire loss a hearing was held in circuit court in Marion County on July 13, 1995 in which the Honorable Jamese Rhoades presided and the petitioner and counsel for both the respondent and the plaintiff were in attendance. The hearing was not recorded at the request of both the plaintiff and the respondent. The petitioner appeared as claimant for his uninsured losses and represented himself. Counsel for the respondent noted that he would file a motion for summary judgment against the petitioner. Petitioner had filed a written request for a full hearing and permission to depose witnesses and transcribe taped telephone conversations but was told by the court that it would be a waste of petitioner's money. Quoting Judge Rhoades, "I think you would be wasting your money, Mr. Jones, because they [witnesses] could move to quash your deposition and I would have to grant it." This was clearly an obstruction of ORCP Rule 47 which gives the opposing party to a summary judgment the right to obtain affidavits and depositions from his witnesses.

The petitioner was so alarmed by the court's obvious bias that the petitioner moved to have the presiding circuit court judge subpoenaed for depositions to clarify any misunderstanding of the court's ruling Judge Rhoades moved to have her subpoena quashed and was so granted by the Honorable Judge Paul

Lipcomb in the Circuit Court of Marion County, Oregon, on December 8, 1995. The court held that it lacked jurisdiction in as much as the petitioner had filed a notice of appeal with the Court of Appeals.

The respondent previously filed a motion for summary judgment against the petitioner on August 4, 1995 and petitioner filed a response to respondent's motion for summary judgment and petitioner moved for a jury trial on August 17, 1995. See Appendix H.

The court granted the respondent's motion for summary judgment against the petitioner on November 17, 1995, thus making petitioner's motion for a jury trial moot. See Appendix E.

The petitioner filed a notice of intent to appeal to with the Court of Appeals for the State of Oregon on November 28, 1995. The subsequent appeals and decisions of both the State of Oregon Court of Appeals and the Supreme Court have been noted in Appendices A through E. The Oregon Court of Appeals and the State Supreme Court denied the appeal; the petition for review; and petition for reconsideration all without opinion.

REASONS FOR GRANTING THE PETITION

This case presents important questions of abuse of summary judgments where the court is empowered to be both judge and jury. Both the State of Oregon and the U.S. Constitutions have provided protection from the taint of abuse by providing guarantees in their

respective Bill of Rights. Historically, the Supreme Court of the State of Oregon has held that no matter how preposterous a dispute may seem to be a motion for summary judgment is inappropriate when genuine issues of material fact are in dispute. This case threatens to devalue each citizen's constitutional guarantee of a trial by jury.

I. SUMMARY JUDGMENT STANDARDS UNDER FED. R. CIV. P. 56

Summary judgment is appropriate when it is demonstrated that there exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970); *Poller v. Columbia Broadcast System,* 368 U.S. 464, 467 (1962); *Jung v. FMC Corp.*, 755 F.2d 708, 710 (9th Cir. 1985); *Loehr v. Ventura County Community College Dist.*, 743 F.2d 1310, 1313 (9th Cir. 1984).

Under summary judgment practice, the moving party

> [A]lways bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any," which it believes demonstrate the absence of a genuine issue of material fact.

Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), "[W]here the non moving party will bear the burden of proof at trial on a dispositive issue, a summary judgment

motion may properly be made in reliance solely on the 'pleadings, depositions, answers to interrogatories, and admissions on file.'" *Id.* Indeed, summary judgment should be entered after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. Id. at 322. "[A] complete failure of proof concerning an essential element of the non moving party's case necessarily renders all other facts immaterial." *Id.* (a) Petitioner alleges that the lower court did not "allow adequate time for discovery " upon motion from the petitioner; (b) that the moving party did not meet its initial responsibility as set forth by the rule in establishing that there "exists no genuine issue as to any material fact." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986); *First Nat'l Bank of Arizona v. Cities Serv. Co.*, 391 U.S. *253, 288-89 (1968); Ruffin v. County of Los Angeles*, 607 F.2d 1276, 1280 (9th Cir. 1979), cert. denied, 455 U.S. 951 (1980).

In attempting to establish the existence of this factual dispute, the opposing party may not rely upon the denials of its pleadings, but is required to tender evidence of specific facts in the form of affidavits, and/or admissible discovery material, in support of its contention that the dispute exists. *Rule 56(e); Matsushita, 475 U.S. at 586 n. 11; First Nat'l Bank, 391 U.S. at 289; Strong v. France, 474 F.2d 747, 749 (9th Cir. 1973).* The opposing party must demonstrate that the fact in contention is material, i.e., a fact that might affect the outcome of the suit under the governing law, *Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors*

Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the evidence is such that a reasonable jury could return a verdict for the non moving party, *Anderson, 242 U.S. 248-49; Wool v. Tandem Computers, Inc., 818 F.2d 1433, 1436 (9th Cir. 1987).* Petitioner demonstrated in his case and appeals that it was virtually impossible not to have a dispute of the material facts since the respondent's case rested solely on the original affidavit of counsel for the Oregon Insurance Guaranty Association, who ultimately supplemented his original affidavit with factual material that disputed the respondent's own case. At best this would mean that the moving party, the respondent, would have had to adjust his case with the supplemental affidavit and its facts, or remain in contradiction of their original evidence on several key points. The respondent did not change his pleadings based on the supplemental affidavit and therein created a dispute of his own material facts regardless of any other issues the petitioner might have brought into dispute.See Appendix F and G

The opposing party, i.e. , the petitioner, need not establish a material issue of fact conclusively in its favor. It is sufficient that "the claimed factual dispute be shown to require a jury or judge to resolve the parties ' differing versions of the truth at trial." *First Nat'l Bank, 391 U.S. at 290; T.W. Elec. Serv., 809 F2d at 631.* Thus the "purpose of summary judgment is to 'pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial.'" *Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e) advisory committee's note on 1963 amendments); International Union of Bricklayers v. Martin Jaska, Inc., 752 F.2d 1401, 1405 (9th Cir., 1985).*

The evidence of the opposing party is to be believed, *Anderson, 477 U.s. at 255*, and all reasonable inferences that may be drawn from the facts placed before the court must be drawn in favor of the opposing party, *Matsushita, 475 U.S. at 587 (citing United States v. Diebold, Inc., 369 U.S. 654, 655 (1992) ; Abramson v. University of Hawaii, 594 F.2d 202, 208 (9th Cir. 1979).* There is no evidence from the lower courts that the petitioner as the opposing party ever had his facts viewed most favorably by the court at all. The lower court's decision stated, in part:

"Claimant [petitioner] has submitted no admissible evidence in opposition to the motion. Without contradiction, receiver's [respondent] motion [for summary judgment] is well taken; there is no genuine issue of material fact and receiver is entitled to judgment as a matter of law."

This is from the same court that essentially barred the petitioner from obtaining evidence from depositions of key witnesses. However, the court was made aware of the discrepancies in two affidavits from the OIGA attorney, because the petitioner placed that evidence into the record at oral argument.

II. CONSTITUTIONAL GUARANTEES OF TRIAL BY JURY

The State of Oregon's Constitution Article I, Sect 17, states "In all civil cases the right of Trial by Jury shall remain inviolate." The constitutional provision that "the trial by jury in all cases in which it has been heretofore used shall remain inviolate forever" was meant to secure the continuancy of the right of trial by a common-law jury

of 12 men in all cases in which a trial by a jury of 12 men was used when the Constitution was adopted. *Cruger v. Hudson River R. Co., 12 N.Y. (2 Kern.) 190, 108; Wynehamer v. People, 13 N.Y. (3 Kern.) 378, 427, 458; Greason v. Keteltas, 17 N.Y. 491, 498; People v. Kennedy, N.Y., 2 Parker, Cr.R. 312, 321; People v. Carroll, N.Y., 3 Parker, Cr. R. 544; Duffy v. People, 6 Hill, 75,78; People v. Goodwin, N.Y., 5 Wend. 251,253; Murphy v. People, N.Y., 2 cow. 815.* Consequently the provision does not prevent the Legislature from authorizing trials to be had by a jury of less number in civil courts of local jurisdiction in actions in which the amount claimed does not exceed the limit of such jurisdiction as it was established before the Constitution went into effect. Nor does it render a statute unconstitutional which provides for a trial by jury of 6 in a justice's court, although the amount exceeds that limit, provided the statute also allows the defendant the right to remove the case to a court where he can have a trial by a jury of 12 men. *People v. Lane, N.Y., 6 Abb. Prac. 105,120.*

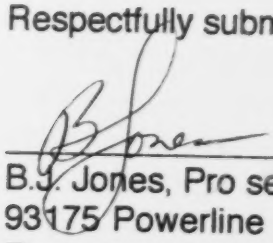
CONCLUSION

There is strength in the language of the State and Federal constitutions as to being "inviolate" and "to preserve" the right of Trial by Jury. To compromise this basic right of jury trial dims the light of justice on a free and open society. And while it may be expedient and cost effective to have a judge be the jury as well; it is not the court's right under the supreme law of the land to diminish an inviolate right with an alleged defective summary judgment pleading. "[I]ssues of fact shall be tried by a jury." 28 U.S.C. 121§1872

Accordingly this Court should, and petitioner respectfully requests this Court to, grant petitioner's petition for writ of certiorari, for the purpose of reviewing the motion for summary judgment granted by the Circuit Court in Marion County for the State of Oregon and upheld by the Oregon Supreme Court by remanding said case back to the lower courts for a Trial by Jury.

DATED: January 21st, 1997

Respectfully submitted,



B.J. Jones, Pro se (Petitioner)
93175 Powerline Road
Eugene, Oregon 97408
Phone: (541) 485-2152

APPENDIX A

IN THE SUPREME COURT OF THE

STATE OF OREGON

STATE OF OREGON ex rel KERRY E. BARNETT, Director of Department of Consumer and Business Services	) Marion County Circuit) Court No. 86C-10499-A
Plaintiff,	) CA A 90907
v.	) SC S43521
FOREST INDUSTRIES INSURANCE EXCHANGE, an Oregon unincorporated association,	) (Filed Dec 17, 1996)
Defendant-Respondent, Respondent on Review	
and	
B.J. JONES,	
Claimant-Appellant Petitioner on Review	) **ORDER DENYING**) **RECONSIDERATON**

The court hs considered the petition for reconsideration and orders that it be denied.

Dated this 17th day of December 1996.

/s/Wallace P. Carson Jr.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

APPENDIX B

IN THE SUPREME COURT OF THE

STATE OF OREGON

SER/KERRY E BARNETT Respondent/Respondent	)	
	)	ORDER DENYING REVIEW
v.	)	CA A90907
	)	SC S43521
FOREST INDUSTRIES INS EXCHANGE Defendant	)	(Filed Oct 22, 1996)
B J JONES Appellant/Petitioner	)	

The court has considered the petition for review and orders that it be denied.

DATE: October 22, 1996

/s/WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:
JOHN L. LANGSLET Attorney for Respondent
B J JONES Attorney for Appellant

This computer-generated case caption may not comply with ORAP 2.05 (1) & 5.05(5

APPENDIX C

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON ex rel) KERRY E. BARNETT, Dir.) of Department of Consum) and Bus. Services,)	Marion County Court
Respondent,)	No. 86C-10499-A
)	CA A90907
v.)	
)	(Filed July 17, 1996)
FOREST INDUSTRIES) INSURANCE EXCHANGE) an Oregon unincorporated) association)	
Defendant,)	
and)	
B.J. JONES,)	
Appellant.)	

Date argued or submitted on briefs: June 28, 1996

Before: Warren, Presiding Judge, and Edmonds and Landau, Judges

Attorney for Appellant: B.J. Jones, pro se

Attorney for Respondent: John L. Langslet/Julie K. Bolt

AFFIRMED WITHOUT OPINION

DESIGNATION OF PREVAILING PARTY AND AWARD OF COSTS

Prevailing party: Respondent

[ ] No costs allowed.
[XX] Costs allowed, payable by : Appellant

In a case which a party could be represented by appointed counsel entitled to compensation under ORS 138.500, but the prevailing party is represented by retained counsel or appeared pro se, the prevailing party is allowed costs.

APPENDIX D

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON ex rel) KERRY E. BARNETT, Dir. of Department of Consum and Bus. Services,	)	Marion County Court No. 86C-10499-A
Plaintiff,	)	CA A90907
v.	)	(Filed Feb 1, 1996)
FOREST INDUSTRIES INSURANCE EXCHANGE an Oregon unincorporated association	)	
Defendant-Respondent,	)	**ORDER DENYING MOTION TO SUPPLEMENT THE RECORD AND FOR EXPEDITED APPEAL**
and	)	
B.J. JONES,	)	
Claimant-Appellant.	)	

Appellant has moved to supplement the record, through affidavits and depositions, with the proceedings of the hearing heald on July 13, 1995, before Judge Jamese Rhoades. The motion is denied.

Respondent has moved that this appeal be decided on an expedited basis. The motion is denied.

Appellant's brief is due 49 days from the date of this order.

/s/Richardson

Chief Judge

Feb 1 1996

c: John L. Langslet
B.J. Jones

REPLIES SHOULD BE DIRECTED TO THE STATE COURT ADMINISTRATOR, RECORDS SECTION, SUPREME COURT BUILDING, 1163 STATE STREET, SALEM , OR 97310

APPENDIX E

IN THE CIRCUIT COURT OF THE

STATE OF OREGON

STATE OF OREGON, ex rel) Kerry E. Barnett, Director) of Consumer and Business) Services,)	Case No. 86C 10499-A
Petitioner,)	JUDGMENT DISALLOW--ING THE CLAIM OF B.J. JONES
v.)	
FOREST INDUSTRIES INS) URANCE EXCHANGE, and) Oregon unincorporated) association,)	(FILED NOV 29 1995 STATE OF OREGON MARION COUNTY CTS.
Respondent.)	ENTERED NOV 21 1995 #9)

The court having previously entered an order granting the motion of the receiver for respondent Forest Industries Insurance Exchange, in liquidation, for summary judgment against the claim of B.J. Jones,

JUDGMENT IS HEREBY GRANTED in favor of the receiver for respondent Forest Industries Insurance Exchange, in liquidation, and against claimant B.J. Jones, and the claim of B.J. Jones is disallowed in its entirety.

Dated this 17th day of November, 1995.

/s/Jamese Rhoades
Jamese Rhoades
Circuit Court Judge

APPENDIX F

The following is the Supplemental Affidavit of John W. Buhler, attorney for the Oregon Insurance Guaranty Association (OIGA) and the Stipulated Judgment of Dismissal that was attached to his affidavit:

STATE OF OREGON) (Filed Sep 15, 1995
) ss. Filed # 3 Marion
County of Clackamas) County Courts)

I, John W. Buehler, being first duly sworn, depose and say as follows:

1. I make this affidavit as a supplemental affidavit to the affidavit executed by me on August 2nd, 1995, in the case of *State of Oregon v. Forest Industries Insurance Exchange (Claim of B.J. Jones)*, Marion County Circuit court, Case No. 86C 10499-A. This supplemental affidavit is submitted at the request of B.J. Jones.

2. In my prior affidavit, exhibit 21 is the Stipulated Judgment of Dismissal entered in the court record in *Oregon Insurance Guaranty Association v. Bj Jones, et al,* United States District Court of Oregon, Civil No. 88-518-JU. As noted in my letter to Mr. Jones of October 20, 1988, which is exhibit 22 to my prior affidavit, Mr. Jones and OIGA agreed that they would be governed by modified release language, rather than the provision of paragraph 3 of the Stipulated Judgment that was filed with the court.

3. The modified release language was negotiated between myself and Mr. Jones on September 22, 1988, and a devised Stipulated Judgment was prepared and

signed by me on that date. The revised Stipulated Judgment was not filed with the court due to the parties' desire to expedite the distribution of funds from the interpleader action. A copy of the revised Stipulated Judgment, signed by me on September 22, 1988, is attached as Exhibit A to this supplemental affidavit. This is the document referred to in my letter to Mr. Jones of October 20, 1988 (Exhibit 22 of my prior affidavit.)

/s/John W. Buehler
John W. Buehler

SUBSCRIBED AND SWORN to before me this 12th day of September, 1995.

Christie L. Regan
NOTARY PUBLIC FOR OREGON
My Commission Expires: Feb 15, 1997

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Telephone: (202) 124-6520
Attorneys for Defendant United States

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

OREGON INSURANCE GUARANTY ASSOCIATION,	) Civil No. 88-518-JJU
Plaintiff,	)
v.	) STIPULATED JUDGMENT OF
Bj JONES, dba Bj investments, and UNITED STATES OF AMERICA,	) DISMISSAL
Defendants.	)

Based upon the Stipulation of all parties in this action, JUDGMENT is entered as follows:

1. Based upon the Disclaimer of Interested by the United States of America, Defendant United States of America is not entitled to receive any of the interpleaded funds which are the proceeds of the fire insurance policy owed by Plaintiff Oregon Insurance Guaranty Association to Defendant Bj Jones, dba Bj Investments;

2. Defendant Bj Jones, dba Bj Investments, is entitled to receive the sum of $16,145, which sums have been deposited in the registry of this Court by Plaintiff Oregon Insurance Guaranty Association, together with any interest which has accumulated on such amounts since being deposited with the Court;

3. Plaintiff Oregon Insurance Guaranty Association is discharged from any further liability to

Defendants (including Barnacle Bill's, Ltd.) in any way based upon claims for insured losses resulting from a fire that occurred on or about September 4, 1985, at the Barnacle Bill's restaurant in Eugene, Oregon **(specifically excluding any claims asserted by Bj Jones in a lawsuit filed by Jones in the United States District Court for the District of Court [sic], case number 87-6618-E, or any other claims for uninsured loss, which claims are expressly excluded from this discharge)***, or from any Internal Revenue Service tax liens or levies asserted for such insurance proceeds;

4. The Clerk of the Court is directed to disburse the sum of $16,145 and any accumulated interest thereon (as deposited in a market rate investment account with the Oregon Bank, Portland, Oregon, Head Office, pursuant to an Order of this Court dated May 17, 1988), said disbursement to be made payable to "Bj Investments" and mailed to: Bj Investments, 93175 Powerline Road, Eugene, Oregon 97401.

5. Each party hereto shall bear its own costs, disbursements and attorney fees.

IT IS SO ORDERED THE _____DAY OF _____, 1988

_____
U.S. DISTRICT COURT JUDGE

*bold type added

The parties hereto through their respective attorneys of record stipulate to the entry of this Judgment.

Dated:Sept 22, 1988

By /s/John W. Buehler
John W. Buehler
of Attorneys for Plaintiff

Dated:_____

By_____
Mark E. Nebergall
of Attorneys for Defendant
United States of America

Dated:_____

By_____
Jeffrey H. Boiler
Attorney for Defendant
Bj Jones, dba Bj Investments

Tax I.D. Info. 485-42-3999

APPENDIX G

IN THE CIRCUIT COURT OF THE

STATE OF OREGON

STATE OF OREGON, ex rel Kerry E. Barnett, Director Department of Consumer and Business Services,	) Case No. 86C 10499-A
Petitioner	)
v.	) AFFIDAVIT OF JOHN W. BUEHLER
FOREST INDUSTRIES INSURANCE EXCHANGE, an Oregon unincorporated association,	) (State of Oregon Marion County Cts Aug -4 1995 Filed #4)
Respondent.	)

STATE OF OREGON)
) ss.
County of Multnomah)

I, John W. Buehler, being first duly sworn, depose and say as follows:

1. I am an attorney licensed to practice law in the State of Oregon. I have been practicing law in Oregon since 1977. One of my specialties is insurance defense litigation.

2. I am currently with the law firm of Buehler &

Buehler. At the time of the events underlying this case, I was a partner in the Portland law firm of Bullivant, Houser, Bailey, Pendergrass and Hoffman.

3. I understand that B.J. Jones has filed a Proof of Claim in the matter of Forest Industries Insurance Exchange (Forest Industries) and Forest Industries Insurance Management, in receivership. Attached as Exhibit 1 to my affidavit is a copy of Mr. Jones' claim dated September 28, 1987, in the sum of $210,212.99. Attached as Exhibit 2 is a copy of the receiver's rejection of that claim.

4. The purpose of this affidavit is to demonstrate to the court that all of B.J. Jones' claims under the Forest Industries policy have been fully adjudicated and paid.

5. B.J. Jones operated Barnacle Bill's Seafood and Ribs Restaurant located at 796 Highway 99 North, Eugene, Oregon. Forest Industries insured B.J. Jones, dba Barnacle Bill's, Ltd., on policy number CP 251339 with a policy period from December 3, 1984, to December 3 1985, with property coverage on the subject building, personal property, and loss of earnings. Exhibit 3. On September 4, 1985, a fire occurred a the building which resulted in damages to the building. Mr. Jones filed a partial Proof of Loss on September 27, 1985, for $16,048.89. Exhibit 4.

6. Although Forest Industries paid for repairs to the building, and also made payments for damages and loss of earnings, B.J. Jones was not satisfied with the payments and continued to assert claims against Forest Industries. Forest Industries was placed in liquidation in 1986, and the Oregon Insurance Guaranty Association (OIGA) undertook the handling of Mr. Jones' claims. I

represented the OIGA in connection with Mr. Jones' claims.

7. Negotiations between the OIGA and Mr. Jones occurred in 1986 and 1987. In the spring of 1987, the OIGA thought that it had settled mr. Jones' claims for $25,000. On May 12, 1987, Mr. Jones wrote to me and said that he would settle for $33,700. Exhibit 5. Subsequently, Mr. Jones increased his claim to %53,208.99 plus interest which was rejected by the OIGA in my letter to Mr. Jones of May 29, 1987. Exhibit 6. Also in that letter stated "...the OIGA hereby exercises its right to have the amount of the insured loss determined by the appraisal process as set forth in the insurance policy."

8. In September or October, 1987, B.J. Jones, along with his wife and other business entities he owned, filed a suit in Lane County Circuit Court against Forest Industries Insurance Exchange and the OIGA for failure to settle and pay an insured claim. Exhibit 7. In addition to claiming damages for emotional distress and punitive damages, the complaint alleged damages representing the amount of the unpaid claim at $100,000. On February 1, 1988, I confirmed an agreement with Mr. Jones' attorney, Jeffrey Boiler, that the lawsuit giled against the OIGA would be dismissed subject to his ability to refile it within sixty days following the date of any appraisal award. Exhibit 8. Mr. Jones then dismissed his lawsuit against both Forest Industries Insurance Exchange and the OIGA. Exhibits 9,10 and 11.

9. In December 1987, B.J. Jones filed another lawsuit, through another attorney, in the U.S. District Court for the District of Oregon against OIGA and Loper

& Associates, Inc. claiming a violation of the Fair Credit Reporting Act. Exhibit 12.

10. On April 6, 1988, the court entered an Order, Findings and Recommendation dismissing Mr. Jones' action against the OIGA. A judgment was entered dismissing the OIGA from that case, and there was no appeal. Exhibits 13 and 14.

11. the OIGA and Mr. Jones proceeded to appraise Mr. Jones' claim, and the OIGA submitted an Appraisal Memorandum. Exhibit 15. An Appraisal Award was entered on March 31, 1988, in favor of B.J. Jones awarding home additional damages of $16,145. Exhibit 16. Because of the existence of a tax lien, the OIGA could not pay B.J. Jones the appraisal award directly but was forced to file an interpleader action in Federal Court. Exhibit 17. The OIGA paid the $16,145 into Federal Court. Exhibit 18. On March 31, 1988, B.J. Jones filed an appeal of the arbitration award in the Lane County Circuit Court. Exhibit 19.

12. The interpleader action was eventually settled, and a stipulated judgment of dismissal was signed by the parties and filed with the court on October 20, 1988, pursuant to which B.J. Jones was paid the entire sum of $16,145. Exhibits 20 and 21.

13. In a letter I wrote to B.J. Jones on October 20, 1988, it was agreed that if Mr. Jones received his money by November 15, 1988, the OIGA would be released. Exhibit 22. I wrote Mr. Jones on November 28, 1988, advising him that the interpleader funds were sent to him by the court at the end of October and that I was closing my file as all matter involving the OIGA were resolved. Exhibit 23. On January 23, 1989, B.J. Jones' case

against Loper & Associates was dismissed by Judge James Redden because Mr. Jones could not state a

violation of the Fair Credit Reporting Act as against Loper & Associates. Exhibit 24.

14. All of the litigation and claims that B.J. Jones had against the OIGA, arising out of the Forest Industries insurance policy, were all resolved. B.J. Jones has been paid everything he was entitled to receive under the Forest Industries insurance policy.

/s/ John W. Buehler
John W. Buehler

SUBSCRIBED AND SWORN to before me this 2nd day of August, 1995.

/s/ Marian L. Sherburn
NOTARY PUBLIC FOR OREGON
My Commission Expires: 11-17-95

APPENDIX H

IN THE CIRCUIT COURT OF THE

STATE OF OREGON

STATE OF OREGON, ex rel) Kerry E. Barnett, Director Department of Consumer Business Services,	) Case No. 86C 10499-A
Petitioner,	) RESPONSE TO RES--) PONDENT'S MOTION) FOR SUMMARY JUDG-
v.	) MENT
FOREST INDUSTRIES EXCHANGE, an Oregon unincorporated assoc.,	) AND) MOTION FOR JURY TRIAL) FROM B.J. JONES, CLAIM) -ANT
Respondent.	) (Filed August 17, 1995)

ORCP 5.050

Oral argument has been requested by the respondent with no court reporting services requested. Claimant, B.J. Jones, objects and requests that reporting services be provided and the cost therein shared equally between the parties. the Court of Appeals disproves of the practice of taking oral testimony at at summary judgment hearing and has suggested that the evidence considered on a motion for summary judgment should be confined to written materials Creditthrift v. Novak, 44 Or App 483, 487 n 1, 605 P2d 1380 (1980).

MOTION

Claimant , B.J. Jones, moves for denial of respondent's MOTION FOR SUMMARY JUDGMENT on the basis that (1) genuine issues of material are in dispute and (2) the party moving for summary judgment has the burden of showing absence of a genuine issue as to any fact material to the application of the law Beachraft Marine Corp. v. Koster, 116 Or App 133, 136, 840 P2d 1336 (1992).

(2) In the alternative of a denial of respondent's MOTION FOR SUMMARY JUDGMENT, the Claimant request a continuance to obtain affidavits or depositions as provided under ORCP 47F.

(3) Claimant moves that the court order a jury determination based on evidence sufficient to demonstrate the existence of one or more material factual issues in dispute PELEGE V. CHRYSLER, 278 Or 223, 227 n 2, 563 Pwd 701 (1977); ENGELKING V. BOYCE, 278 Or 237, 241-242, 563 P2d 703 (1977).

MEMORANDUM OF LAW

Pursuant to ORCP 47 a summary judgment is appropriate only when there is no dispute as to the facts necessary to prove a claim. The genuine issues of material facts do not arise solely on the basis of Claimant's insured losses, but rather on the consequential damages and those uninsured losses as well. "Consequential damages" are defined as "losses which did not flow directly or immediately from the acto of the party" RICHMOND REDEVELOPMENT HOUSING AUTHORITY v. LABURNUM CONSTRUCTION CORP., 195 Va. 827, 80 S.E. 2d 574, 580.

The consequential damages sustained by the Claimant occurred when the respondent hired a contractor to do the fire restoration on the Claimants building and the smoke odors were never eliminated which caused both business and real estate losses for the Claimant. These types of losses which are a result of an act but are not direct and immediate are matters of law ROANOKE HOSPITAL ASS'N v. DOYLE & RUSSELL, INC., 215 Va. 796, 214 S.E. 2d 155, 160.

ARGUMENT

The respondent's MOTION FOR SUMMARY JUDGMENT does not speak to the issues of consequential damages suffered by the Claimant, but rather focuses on the insured losses that were settled in fact. Respondent relies solely on the affidavit of John W. Bu[e]hler as to the terms of the agreement between the parties. But in a letter, copy enclosed as EXHIBIT 1, from John W. Bu[e]hler and dated April 22, 1987, Mr. Bu[e]hler discusses the terms of the Release stating:

> "The document does specifically exclude any release against the contractor and Valley Pacific. The Release also excludes the Insurance Commissioner, the receivership estate of Forest Industries, and the insurance agent, but the exclusion of these parties from the Release applies only to any claims above and beyond the terms of the insurance policy and OIGA's coverage."

The relevant portions of that Release agreement are enclosed as EXHIBIT 2 and attached hereto. The Release was prepared by Mr. Bu[e]hler and was never signed by the parties because no agreement was ever

reached as to the money portion of the Release which was eventually settled in arbitration. No mention of this Release is in the affidavit of Mr. Bu[e]hler who knows full well that the claim was for the insured losses in the policy only and not for the consequential damages alleged by the Claimant in the original and subsequent proof of loss claims.

The affidavit of Mr. Bu[e]hler attached only the first sheet of the claimant's proof of loss which was dated September 28, 19987. The original claim was sent to the Oregon Insurance Commissioner; Oregon Insurance Guaranty Association; and Graham Miller, Inc. dated July 21, 1986. The re-filling on the "official" [sic] form in September of 1987 was attached to copies of the original and made a part thereof. A complete and true copy of the original claim with the proof of claim form are attached herein as EXHIBIT 3. The issue before the court is whether or not the respondent is allowed to include all these unsettled claims of consequential damages within the scope of the insured claims; even though the respondent failed to develop or even mention them in his MOTION FOR SUMMARY JUDGMENT. In this regard, con the court grant a summary judgment on an issue that was not even raised by the respondent; and if the issue was not raised by the respondent is it not true then that a dispute of the facts has to exist?

As to the claim itself there are two basic parts (1) one for the insured losses and (2) the other for the consequential damages. Regarding the consequential damages no release against the "estate" of Forest Industries was ever negotiated between the parties. The Claimant tried to negotiate with the receiver of Forest Industries, Jack L. Sanguine, on his claim of

consequential damages and received the letter dated May 11, 1987. The receiver was in error in a number of statements he stated in this letter including his reason that the claim had not been made on "an approved claim form" EXHIBIT 4 attached herein. The Claimant can find no other in the law to suggest that there is only one form for filing a "proof of loss". Actually the proof of loss form attached to both Mr. Bu[e]hler's affidavit and EXHIBIT [sic] 3 was never delivered to the Claimant until the following September and was noted by the Claimant to be his "SECOND FILING'. The Claimant has attempted to settle his consequential damages out of the estate of Forest Industries by asserting his claim should have been settled out of the $500,000 prepaid premiums that were awarded Valley Pacific Insurance Company (Valley Insurance) by the receiver, the State of Oregon Insurance Commissioner, Josephine M. Driscoll. Valley Pacific Insurance was a newly formed corporation following the insolvency of Forest Industries and presently operates out of the same institution [as did Forest Industries]. The Claimant has asserted his right to those prepaid insurance premium for settlement of his consequential damages claim. Valley Pacific Insurance (Valley Insurance Company) has denied the Claimant any settlement from those premiums and has stated:

"As to your [Claimant's] reference of $500,00 in prepaid premiums, those dollars were used to pay losses occurring after March 7, 1986." Letter dated December 12, 1991 from Stuart E. Olson, Sr. Vice President of Valley Insurance Company and copy attached herein as EXHIBIT 5. Pursuant to ORCP 47F the Claimant is entitled to depose Mr. Olson and examine the actual records of the disposition of those prepaid premiums.

Finally, the respondent, as the moving party for summary judgment must show that the facts, as shown by undisputed proof, entitle that party to judgment, regardless of the burden of proof at trial. The Claimant therefore respectfully requests that these disputed issues of material fact be resolved in a jury determination as a matter of law and the respondent's MOTION FOR SUMMARY JUDGMENT be denied.

Respectfully submitted this 17th day of August, 1995.

/s/ B.J. Jones
B.J. Jones, Claimant